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Supreme Court, U.S.
FILED
OCT 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-465

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MOUNTAIN PLAINS CONGRESS OF SENIOR ORGANIZATIONS; MR & MRS. HUGH A. GROVES; FRANCIS SEELY; ESTELLE WHITTLE; HENRY WHITTLE; MR. & MRS. BURTON W. ATKINSON; MR. & MRS. C.E. DIETRICH; HARRIET MILLER; and ALICE VAN LANDINGHAM,

Petitioners,

v.

NATHAN MALCHMAN, GERTA CONWAY, WILLIAM DEAUTRIELL and LOUIS STONE,

and

LEONARD DAVIS, SOPHIE DAVIS, COLONIAL PENN GROUP, INC., COLONIAL PENN FRANKLIN INSURANCE COMPANY, INTRAMERICA LIFE INSURANCE COMPANY, NATIONAL ASSOCIATION PLANS, INC., AMERICAN ASSOCIATION OF RETIRED PERSONS, NATIONAL RETIRED TEACHERS ASSOCIATION, CARRIE B. ALLEN, ORANDA BANGSBERG, BERNARD BERGGREN, JUNE BIGGAR, ARTHUR BOUTON, OLAF KAASA, CLARA L. KLEWENO, FLOYD E. TUMBLESON, J. LEONARD JOHNSON, C.E. CARMICHAEL, AMERICAN ASSOCIATION OF RETIRED PERSONS INSURANCE TRUST, DOROTHY M. CRIPPEN, JAMES J. BROWNING, LLOYD I. SINGER, CYRIL F. BRICKFIELD and JOHN J. MACWILLIAMS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

For appearances see reverse side of cover

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that the District Court did not abuse its discretion in approving a class action settlement which included an agreement concerning attorneys' fees, when both the District Court and the Court of Appeals found that no negotiation concerning attorneys' fees took place until after the merits of the settlement were agreed upon in principle and that no rights of the plaintiff class were surrendered in return for an agreement on attorneys' fees?

2. Did the Court of Appeals err in holding that the District Court did not abuse its discretion in approving this class action settlement upon a finding that the plaintiffs were adequate class representatives, when the Court of Appeals' own independent examination of the record showed that the plaintiffs "were quite appropriate, perhaps even zealous members of the class"?

3. Did the Court of Appeals err in holding that the District Court did not abuse its discretion in certifying for settlement purposes a class larger than the class originally pleaded, when the Court of Appeals found that the interests of the members of the broadened class were not antagonistic to the interests of the members of the original class, the plaintiffs were adequate representatives of the broadened class and expansion of the class served the reasonable objective of giving the defendants maximum protection against further litigation?

4. Did the Court of Appeals err in holding that the District Court did not abuse its discretion in concluding that the objectors to the settlement failed to present any cogent factual objections warranting a reopening of the extensive evidentiary record upon which approval of the settlement was based?

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners ask this Court to review a matter properly committed to the sound discretion of a district court: the approval of a class-action settlement. Where two federal courts, a New York state court, and a state-court referee have granted such approval upon well-established principles of law and a thorough evidentiary record, review by this Court is not warranted.

Overview of the Settlement

This action, and a companion state court action, sought to end the historically close relationship between Colonial Penn Group, Inc. ("CPG")[1], a provider of group health insurance and other services and products, and two national associations of senior citizens, the American Association of Retired Persons ("AARP") and the National Retired Teachers Association ("NRTA") (together, the "Associations"). The settlement granted the plaintiff class virtually all the relief originally sought. The relationship between CPG and the Associations was terminated, a competitive process for underwriting the Associations' group health insurance program was introduced, and CPG was no longer permitted exclusive advertising rights in the Associations' publications. As the District Court found, "[f]ew class actions have ever succeeded in altering commercial relationships of such magnitude. Few class action settlements have even approached the results achieved here" (App. 53a).

Petitioners' assertion that "[a]ll three Circuit Judges on the Second Circuit panel recognized the grievous wrong done to the 11,200,000 class members by this settlement" (Petition at 4) is simply wrong. In fact, the Court of Appeals carefully scrutinized the negotiating process as well as the substantive terms of the settlement and accepted the District Court's conclusion that

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[1] Pursuant to Rule 28.1 of the Rules of the Court, Respondent CPG submits the following statement of its corporate relationships: Champion International Corporation (affiliate). Respondent Associations have no corporate relationships within the meaning of Rule 28.1.

this was a fair and reasonable settlement, not a "sweetheart deal" between defendants and class counsel. The Court of Appeals noted: "The experience of counsel and the vigor with which the case was in fact prosecuted indicate that the negotiation process in general was aboveboard, at arm's length, and noncollusive" (App. 21a). The courts below specifically found — and the record supports the finding — that there was no negotiation concerning attorneys' fees until after the principles of the settlement were agreed upon, and that no rights of the plaintiff class were bargained away in return for an attorneys' fee agreement (App. 24a-25a, 72a).

Thus, contrary to Petitioners' assertions, this case does not present any novel or unresolved issue concerning supposed "simultaneous negotiation" of merits and attorneys' fees in class action settlements or, as we will show, any other issue meriting review by this Court. It presents merely the familiar complaint of a litigant who is unhappy with factual findings of the lower courts. The petition for writ of certiorari should be denied.

A. *The Course of the Litigation*

This lawsuit, and the companion state court case commenced in 1976, sought injunctive relief only — primarily, an end to CPG's role as the exclusive provider of health insurance and other services to the Associations' memberships.[2] Although this suit relied on federal antitrust claims and the state court action was based on a claim of breach of fiduciary duty, both suits were predicated on essentially the same factual allegations.

The lawsuits were hotly contested up to the time they were settled in 1980. During three years of discovery, the parties produced tens of thousands of pages of documents and took 66 days of depositions, comprising thousands of pages of transcript (App.

[2] No damage claims were made in either lawsuit. As the Court of Appeals held in approving the settlement, the hypothetical federal damage claims that were foreclosed as part of the comprehensive settlement agreement among the parties in fact "had no viability and . . . no worth" (App. 18a n. 4).

47a).[3] CPG and the Associations vigorously defended their relationship.[4] Plaintiffs, in turn, retained two law firms to assist them in this large-scale litigation.

B. *Settlement of the Litigation*

Beginning in early 1979, CPG and the Associations decided that it would be in their best interests to quell the criticism and controversy which was hindering the conduct of their respective activities, and began taking steps to change their relationship. In February 1979, the Associations passed a series of resolutions leading to the termination of CPG's role as the exclusive provider of health insurance and other services to the Associations' members. The District Court noted: "it is obvious that the vigorous prosecution of these lawsuits was the principal cause, if not the sole cause," of the changes in the relationship between CPG and the Associations (App. 51a).

Serious negotiations focusing on settlement of this litigation began in late 1979.[5] By early 1980, the parties had reached an

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[3] Discovery was conducted primarily in the state court action, which was filed a year earlier than the federal action, on the understanding that the discovery could also be used in the federal action (App. 5a).

[4] As the courts below found, the relationship between CPG and the Associations had been enormously beneficial to both parties. Circuit Judge Newman, in his concurring opinion on the first appeal, noted: "[t]he Associations had entered into an exclusive arrangement with the Colonial Penn Group at a time when no other insurer appeared willing to write group health insurance policies for the elderly. The risk that CPG took turned out to be advantageous for it, and it made substantial profits" (App. 97a).

[5] In early 1979, as the Court of Appeals noted, there had been a brief and fruitless round of settlement discussions (App. 20a). The record shows that at that time, counsel for CPG believed that plaintiffs intended to seek an attorneys' fee of approximately $4 million. CPG had no interest in paying such an attorneys' fee, and settlement discussions broke off (App. 23a-24a). The litigation then entered an extremely vigorous stage. In 1979 alone, extensive depositions were taken, most of the tens of thousands of pages of documents exchanged in discovery were produced, and defendants' motion to dismiss the federal action was exhaustively briefed (App. 5a, 47a-48a).
(footnote continues)

agreement in principle which gave plaintiffs virtually all of the relief demanded in the complaint. In return for this broad injunctive relief, defendants asked for an assurance that the settlement would bring an end to all possible class-based litigation on the matters at issue in the litigation. The plaintiffs accepted that principle. Accordingly, the agreement reached in early 1980 also committed plaintiffs to broadening the class to include all insurance-buying members of AARP or NRTA as of November 1980, adding NRTA as a defendant and waiving all potential claims, however hypothetical, including possible claims for damages, relating to matters alleged in the complaints.

The District Court aptly described this settlement as among the most successful conclusions ever reached in a class-action litigation:

> It is difficult to overstate the far-reaching results of this litigation and the settlement. Relationships between the Associations and CPG which had existed for more than 20 years came to an end. The value of those relationships is only partly indicated by the figure of $261 million for health insurance premiums paid by AARP/NRTA members in 1977, the year the federal action was commenced.... The Associations have broken virtually all ties to CPG, and group health insurance contracts and other business dealings are now dealt with by CPG on an open competitive basis.... Few class actions have ever succeeded in altering commercial relationships of such magnitude. Few class action settlements have even approached the results achieved here (App. 53a).

Judge Mansfield's dissenting opinion in the Court of Appeals relies in large measure on his "finding" that during this early round of discussions in 1979, the parties actively negotiated on the question of attorneys' fees (App. 36a-40a). There is simply no support in the record for this "finding," and it is contrary to the facts as found by the District Court and affirmed as not clearly erroneous by the majority in the Court of Appeals (App. 23a-24a, 72a). In fact, the record demonstrates that the negotiations to which Judge Mansfield referred actually took place in 1980, *after* the principles of the settlement were agreed to (*id*).

These results, as both the District Court and Court of Appeals held, belie objectors' absurd claim of a "sweetheart" deal between plaintiffs and defendants.

Following agreement on the principles of the settlement, the parties spent several months negotiating the precise terms of the stipulation that would accomplish the settlement previously agreed upon. They also entered into negotiations that ultimately led to an agreement that defendants would not oppose an application for attorneys' fees and disbursements that did not exceed $2.325 million (App. 24a). The final stipulation of settlement was executed on November 3, 1980 (App. 49a).

C. *Approval of the Settlement*

The stipulation of settlement was submitted to the state and federal courts. In the state-court action, the court appointed a referee to conduct hearings on the settlement and to report on his findings (App. 52a). The referee conducted extensive hearings between January and May of 1981 and permitted the Petitioners herein to appear in opposition to the settlement and submit briefs supporting their position. The entire record before the referee was made available to Petitioners' attorneys, including all deposition transcripts and documents produced during discovery.

Following these hearings and briefing by all participants, the referee issued a report analyzing the litigation and settlement in detail, finding the settlement to be reasonable, fair and adequate, and recommending its approval by the state court, including plaintiffs' application for $ 2.325 million in attorneys' fees and disbursements (App. 52a). The District Court, relying on the state referee's report and extensive briefs evaluating the federal issues, first approved the settlement in September 1982.

On the first appeal of the District Court's decision approving the settlement, the Court of Appeals held that it was unable to affirm without the District Court's independent analysis and findings in three areas: the merits of the plaintiffs' claims, the difficulty of proving damages, and the fees awarded to plaintiffs'

attorneys (App. 94a-96a). The District Court, on remand, addressed each of these areas and found that plaintiffs' potential claim for federal antitrust damages was not only weak on the merits but, as a practical matter, virtually incapable of proof (App. 54a-56a).

The District Court also examined, and rejected, the objectors' charges that class counsel had traded away potential damage claims in return for defendants' agreement regarding attorneys' fees. The Court found that the negotiation of attorneys' fees did not occur "until after the main substantive terms of the settlement were arrived at" (App. 72a), which terms included a waiver of damage claims by the plaintiff class. Indeed, the Court held that throughout the litigation, class counsel pursued the interests of the class "with outstanding vigor and dedication," and that "[t]here has never been the slightest hint in the conduct of plaintiffs' attorneys that they were willing to sacrifice legitimate claims for an easy settlement" (App. 65a-66a).

D. *The Decision Below*

The Court of Appeals affirmed these findings and the District Court's approval of the settlement. Judge Oakes, writing with the full concurrence of Judge Newman, declared himself to be completely satisfied on the questions he had raised in his majority opinion on the first appeal.

The Court of Appeals' opinion focused first on the adequacy of representation by the class representatives. Supplementing the District Court's findings on this question, the Court of Appeals made its own examination of the extensive depositions of the class representatives and concluded that these individuals "were quite appropriate, perhaps even zealous members of the class" (App. 12a). The Court of Appeals also considered whether the original class representatives could serve as representatives of the expanded settlement class and concluded:

> In short, the interests of the members of the broadened class in the settlement agreement were commonly held, and there is therefore no basis for disturbing the district court's finding on adequacy of representation (App. 13a).

The Court of Appeals next considered the adequacy, fairness and reasonableness of the settlement. On what it described as the "key issue," the Court agreed with the District Court that plaintiffs' potential federal antitrust and derivative damage claims in fact "had no viability and . . . no worth" (App. 18a n.4).[6] The Court also held that the District Court's finding that "[f]ew class actions have ever succeeded in altering commercial relationships of such magnitude" was not clearly erroneous and that the changes in the relationship between CPG and the Associations were "caused in substantial part by the suit(s)" (App. 21a).

Finally, the majority specifically affirmed the District Court's determination that "the conduct of the parties leading to agreement on attorneys' fees was proper," and noted that "the course of negotiations on the settlement in general reflects the absence of a 'sweetheart' relationship between negotiating parties" (App. 24a-25a).[7] After studying all these matters, the Court of Appeals

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[6] Petitioners' contentions regarding the valuable damage claims supposedly surrendered by plaintiffs simply neglect both courts' findings that, putting aside the inconsequential amounts any class member could ultimately recover, the difficulty of proving such claims would be insurmountable. As the Court of Appeals noted, "there were some seventeen different AARP plans [for insurance coverage] and nine NRTA plans in effect during the relevant period from 1973 to 1980 . . . and a method would have been required to compare the particular mix of premiums and benefits in each plan with the premiums and benefits that a claimant hypothetically would have paid or received in the absence of alleged anti-trust violations" (App. 15a). The Court went on to point out that, although it had invited the objectors to specify means by which such damages could be proved,

> apparently suggestions as to these were not forthcoming from the objectors on remand — not in their 'offer of proof' . . . nor in their reply brief on appeal, from which we view the lame statement that 'space does not permit us to respond to appellees' assertions that the damage claims were not viable' as evidence to the contrary (App. 15a-16a).

[7] Judge Newman concurred in Judge Oakes' opinion, and wrote a separate opinion discussing his views on the advisability of "clear sailing" agreements in *(footnote continues)*

found no issue on which Petitioners' request for further discovery had been supported by "cogent factual objections" (App. 12a & *passim*), and approved the settlement with a slight modification in the amount of attorneys' fees, subject to the approval of the state court in the companion case, *Conway v. Davis*.[8]

SUMMARY OF ARGUMENT

The lower courts' exercise of discretion in approving this settlement presents no issue of precedential significance for this Court's review. The courts below applied established law in determining that the settlement was fair and reasonable, that it achieved enormous benefits for the plaintiff class, and that the plaintiffs surrendered nothing of value in obtaining the settlement. Their findings, based on an extensive record, that the parties reached an agreement on the merits prior to any negotiations on attorneys' fees, are not clearly erroneous.

Moreover, Petitioners are grasping at straws in relying on *Jeff D. v. Evans*, 743 F.2d 648 (9th Cir. 1984), *cert. granted*, ____ U.S. ____, 105 S. Ct. 2319 (1985) (No. 84-1288), as support for a grant of certiorari in this case. *Jeff D.* presents the issue of whether, in settling a civil rights class action, a defendant can demand that the plaintiff waive his statutory right to attorneys' fees. In *Jeff D.*, therefore, this Court will be asked to examine the conflict between the public policy favoring the award of attorneys' fees in civil rights litigation and the policy encouraging

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class action settlements – *i.e.*, agreements in which the defendant agrees not to oppose class counsel's application for fees up to a specified amount. Judge Newman noted that such agreements may deprive the court of an adversarial presentation on the reasonableness of the fees – a risk which, as he recognized, did not materialize in this case, where the fee award was vociferously contested by the objectors (App. 31a). Judge Newman also expressed concern about the possibility that class counsel could trade away something of value to the class in return for such an agreement – again, a potential problem which the majority found had not occurred in this case (App. 24a-25a).

[8] The approval of the New York Supreme Court in *Conway* was granted by memorandum decision dated September 9, 1985. *See* New York Law Journal, September 19, 1985, p. 7.

settlement of class actions. The issues presented in this case involve no such policy conflict and bear no relationship to the question before the Court in *Jeff D.*

Finally, none of the other questions presented by Petitioners are worthy of certiorari. The attacks upon the adequacy of the named plaintiffs as class representatives, the scope of the certified class, and the District Court's denial of discovery merely challenge the District Court's exercise of discretion. The Court of Appeals' affirmance of the District Court, based on a thorough review of an extensive record, raises no issues meriting this Court's review on certiorari.

ARGUMENT

I.

THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S APPROVAL OF A CLASS ACTION SETTLEMENT WHICH ALSO INCLUDED AN AGREEMENT CONCERNING ATTORNEYS' FEES WHERE THE DISTRICT COURT AND THE COURT OF APPEALS FOUND THAT NO NEGOTIATION CONCERNING ATTORNEYS' FEES TOOK PLACE UNTIL AFTER THE MERITS OF THE SETTLEMENT WERE AGREED UPON IN PRINCIPLE AND NO RIGHTS OF THE PLAINTIFF CLASS WERE SURRENDERED IN RETURN FOR AN AGREEMENT ON ATTORNEYS' FEES

The Court of Appeals carefully examined the District Court's decision and the record below to determine the fairness, reasonableness, and adequacy of the settlement, as required by Rule 23 of the Federal Rules of Civil Procedure. Both courts compared the substantive terms of the settlement to the likely results of a trial, *see Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968), and examined the negotiating process to assure that it was untainted by collusion or other improprieties. *See Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 104 S. Ct. 77 (1983). The Court of Appeals' decision represents nothing more than an affirmance of a classic exercise of discretion by a District Court, based on factual findings that are not clearly erroneous (*see* App. 21a).

Moreover, the Court of Appeals broke no new ground in affirming a class action settlement which included an agreement relating to attorneys' fees to class counsel. Although this Court was invited, in *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982), to create a *per se* rule forbidding the parties from reaching an agreement concerning attorneys' fees prior to court approval of a class action settlement, this Court declined to do so:

> "In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel."

Id. at 454 n.15.

As both courts below held, counsel in this case *did* resolve any potential ethical conflict by refraining from negotiations on attorneys' fees until the principles of the settlement were first agreed upon. Those findings, as the Court of Appeals noted, are not reviewable unless they are clearly erroneous (App. 21a; *see* Fed. R. Civ. P. 52). The question whether the lower court's factual findings were clearly erroneous, however, does not present an issue worthy of certiorari.

Petitioners' application to this Court not only neglects the factual findings below, but misrepresents the Court of Appeals' holding. Particularly objectionable is Petitioners' misquotation of the Court of Appeals' decision in the Petition's "Statement of the Case." Contrary to Petitioners' contention, the majority opinion did not find that the settlement agreement "amounted to little more than a trade of damages relief foreclosure for attorneys' fees" (Petition at 4-5, *quoting* App. 20a). In fact, the majority opinion described that characterization of the settlement as a mistaken "first impression" which did *not* survive deeper scrutiny of the record (App. 20a; 21a-25a). After such scrutiny, the Court of Appeals held that "the conduct of the parties leading to agreement on attorneys' fees was proper" (App. 24a) and "reflects the absence of a 'sweetheart' relationship between negotiating parties" (App. 24a-25a).

The dissenting Circuit Judge did not disagree with the majority on any issue of law, but took issue with the District Court's factual findings — without, however, acknowledging the "clearly erroneous" standard by which review of such findings is governed. Furthermore, the dissent's view of the facts is not supported

by the record. *See* note 5 *supra*. This Court does not sit to resolve such conflicts over the correct interpretation of the factual record.

Petitioners have also attempted to argue that the Court of Appeals' decision here is "in conflict" with decisions in other Circuits on the issue of negotiations concerning attorneys' fees, but that "conflict" is illusory. Petitioners' reference to "four circuits" which have "expressed strong disapproval of simultaneous settlement negotiations involving attorneys' fees and merits issues" (Petition at 21) is beside the point, for two reasons. First, as discussed immediately above, both the District Court and the Court of Appeals found that there was no simultaneous negotiation of merits and attorneys' fees.

Second, three of the four circuits cited by Petitioners hold only that courts should be careful in scrutinizing settlement agreements which include an award of attorneys' fees.[9] In this case, the courts below conducted a careful examination of the facts, and concluded that no "sweetheart" deal was made.

Only one court of appeals decision seems to have adopted a *per se* rule against negotiation of fees with the merits. *See Prandini v. National Tea Co.*, 557 F.2d 1015, 1020-21 (3d Cir. 1977). But that decision, which has been heavily criticized and may not even be good law in its own circuit,[10] has been limited to cases in which the settlement involves a monetary fund which the parties by agreement have purported to allocate between the class

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[9] *See Jeff D. v. Evans*, *supra*, 743 F.2d at 652 (noting that 9th Circuit has not adopted *per se* rule against negotiation of attorneys' fees with merits); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 n.71 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) (courts should examine settlement carefully where simultaneous negotiations have occurred, but no *per se* rule adopted); *Obin v. Dist. 9, Int'l Ass'n of Machinists & Aerospace Workers*, 651 F.2d 574, 582-83 (8th Cir. 1981). *See also Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093, 1100-04 (D.C. Cir. 1985) (rejecting *per se* rule).

[10] *See El Club del Barrio, Inc. v. United Community Corporations, Inc.*, 735 F.2d 98, 101 n.3 (3d Cir. 1984) (citing extensive critical commentary and noting that "*Prandini* may be, as suggested by defendants' counsel, 'more honored in the breach' ").

members and their attorneys. *See Shlensky v. Dorsey*, 574 F.2d 131, 150 (3d Cir. 1978). In a monetary fund case, defendants have no legitimate interest in the attorneys' fee award (they will pay the same amount regardless of the allocation), and there is no justification for an agreement among the parties. In cases like this, however, where there is no fund and where the defendants will be liable for attorneys' fees, defendants have a legitimate interest in knowing their liability for fees before they agree to a settlement. Therefore, a rule barring discussions of fees prior to approval of the settlement would in fact inhibit settlement, as both Judge Oakes (App. 24a-25a) and Judge Newman (App. 29a-30a) found.

Finally, Petitioners' effort to align this case with *Jeff D. v. Evans*, *supra*, is without merit. *Jeff D.*, on which this Court will rule this Term, presents the question whether a defendant's insistence on a stipulation waiving attorneys' fees for class counsel in a civil rights case is barred by the public policy supporting an award of attorneys' fees to prevailing plaintiffs.

The issues of unfair coercion inherent in that situation are simply not presented here. Where, as here, the defendant agrees to pay attorneys' fees on settlement of a class action, the only ethical question presented is whether class counsel has accepted such fees at the expense of relief that might be gained by the class. The courts below did not ignore this potential problem here, but carefully scrutinized the settlement to assure themselves that no such trade-off was made. Hence, a decision in *Jeff D.* will not alter the outcome here, even if this Court affirms the principle that a defendant in a civil rights action may not require a waiver of attorneys' fees as a condition of settlement.

The decision in *Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093 (D.C. Cir. 1985), demonstrates this point as well. In *Moore*, much as in *Jeff D.*, the Court was asked to rule on a class-action settlement in which the named plaintiff had waived any claims to attorneys' fees. The *Moore* court held that cases such as *Moore* and *Jeff D.* are "decidedly different" from cases such as this one, which involves a defendant's agreement to pay attorneys' fees as part of a negotiated settlement. Fee-waiver cases, the *Moore* court held,

> involve wholly separate tensions. In the present case rather than being concerned about tempting plaintiffs' counsel to be greedy, *a situation which ethical counsel can avoid*, we focus on whether defense counsel may have coerced plaintiffs' counsel into accepting less.

Id. at 1103 (emphasis supplied).

In this case, the courts below found that counsel did avoid the potential problem of "tempting plaintiffs' counsel to be greedy." Accordingly, there is no basis for holding this case pending the outcome of *Jeff D.*

II.

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN APPROVING THE SETTLEMENT AS FAIR AND REASONABLE, UPON FINDINGS THAT THE CLASS REPRESENTATIVES AND THEIR LAWYERS WERE VIGOROUS IN REPRESENTING THE CLASS, THAT THE EXPANSION OF THE CLASS FOR PURPOSES OF SETTLEMENT WAS APPROPRIATE AND THAT THE OBJECTORS FAILED TO PRESENT ANY COGENT FACTUAL OBJECTIONS WARRANTING A REOPENING OF THE EXTENSIVE RECORD UPON WHICH APPROVAL OF THE SETTLEMENT WAS BASED

Petitioners' remaining objections to the settlement were all addressed at length by the courts below, and present nothing worthy of this Court's review. The Court of Appeals gave careful attention to the objectors' claim that the named plaintiffs were inadequate class representatives, and rejected the claim, finding that the named plaintiffs "were quite appropriate, perhaps even zealous members of the class", despite the personal relationships between some of the named plaintiffs and class counsel (App.

12a; *see also* App. 8a-12a). Contrary to Petitioners' assertions, this decision creates no "conflict" with that of any other circuit.[11]

Petitioners' challenge to the scope of the class that was certified for purposes of settlement presents even less for this Court's review. The courts below broke no new ground in approving class certification for settlement purposes. The very case on which Petitioners place primary reliance, *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981), *upheld* certification of a plaintiff class for purposes of concluding a settlement.[12] Indeed, certification of a class for purposes of a settlement has become a well accepted component of class action practice. *See* 2 Newberg, Class Actions § 11.22, at 418 (2d ed. 1985).

Nor was there any impropriety in expansion of the settlement class to include all AARP members. As both courts below found, the original class representatives were adequate representatives

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[11] None of the cases relied upon by Petitioners enunciates a *per se* rule forbidding certification of a class where some of the class representatives are related to class counsel. *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 93-94 (7th Cir. 1977), specifically declined to adopt any *per se* rule on the subject, and simply held that the district court did not abuse its discretion in denying certification where all of the named plaintiffs were related to class counsel. *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1378 (11th Cir. 1984), also merely affirmed the district court's denial of certification under the abuse-of-discretion standard. *Turoff v. May Co.*, 531 F.2d 1357 (6th Cir. 1976), is totally inapposite; there, three of the four named plaintiffs were *attorneys* in class counsel's law firm, and the fourth was the wife of an attorney with class counsel's firm. In short, certification of a class where one or more of the named plaintiffs has a personal relationship with class counsel breaks no new ground in class action litigation. *See, e.g., Lewis v. Goldsmith*, 95 F.R.D. 15, 20 (D.N.J. 1982); *Fischer v. International Tel. & Tel. Corp.*, 72 F.R.D. 170, 173-74 (E.D.N.Y. 1976); *Umbriac v. American Snacks Inc.*, 388 F. Supp. 265, 275 (E.D. Pa. 1975); *Dolgow v. Anderson*, 43 F.R.D. 472, 496 (E.D.N.Y. 1968).

[12] In any event, Petitioners' only real objection to certification here is based on their argument that valuable damage claims were foreclosed through the settlement. This simply ignores the findings of both courts below that such damage claims "had no worth" (App. 18a n. 4; *see also* 54a-58a).

of the entire settlement class and had no interests antagonistic to those brought within the class for settlement purposes (App. 13a, 67a).

Finally, Petitioners' complaint that the District Court improperly denied their request for discovery and an evidentiary hearing also presents no issue warranting this Court's attention. Extensive evidentiary hearings were held in the state court, at which the objectors appeared and made substantial presentations. In the course of those proceedings, the objectors were given access to, and examined, the entire record of discovery in this litigation. Moreover, the objectors were given every opportunity to justify their request for further discovery in the proceedings on settlement of the federal action. The sole reason for denial of that request was their failure to produce " 'cogent factual objections' indicating the need for discovery or possible evidentiary hearing" (App. 12a, *citing Weinberger v. Kendrick*, *supra*, 698 F.2d at 79).

CONCLUSION

For the reasons set forth herein, Respondents Colonial Penn Group, Inc., the American Association of Retired Persons, and the National Retired Teachers Association respectfully pray that the application for writ of certiorari to review the decision of the Second Circuit be denied.

Respectfully submitted,

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October 18, 1985